

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to
Rules Governing Intoxication Testing Utilizing
Evidentiary Breath Tests, *Minnesota Rules*
Chapter 7502

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.389**

This matter came before Administrative Law Judge Eric L. Lipman upon the application of the Minnesota Department of Public Safety for a legal review under Minn. Stat. § 14.389.

On February 10, 2012, the Department filed documents seeking review and approval of the above-entitled rules under Minn. Stat. § 14.389 and Minn. R. 1400.2410.

Based upon a review of the written submissions and filings, and for the reasons set forth in the attached memorandum,

IT IS HEREBY DETERMINED:

1. The agency has the statutory authority to adopt the rules.
2. The rules were **NOT** adopted in compliance with all of the procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
3. The Agency committed one procedural error that cannot be cured by reference to the rulemaking record or waived as a harmless error.

IT IS HEREBY ORDERED:

1. The rules are **DISAPPROVED**.

Dated: February 22, 2012

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, section 14.389, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules of the Office of Administrative Hearings identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge.¹ Among these circumstances include situations in which a rule was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded. In this rulemaking process, the Administrative Law Judge has found one procedural defect.

Procedural Defect under Minn. R. 1400.2410, subp. 2, Item I and Minn. R. 1400.2090, Item A – Contents of the Order of Adoption

Pursuant to Minn. R. 2410, an agency that proposes to adopt a rule under the expedited rule process must submit an “order adopting the rule that complies with the requirements in part 1400.2090.”²

Minn. R. 1400.2090 requires, in part, that “if any changes were made to the proposed rule in the adopted rule” the adoption order must include “a description of the changes and an explanation of the reasons for the changes and why they do not make the rule substantially different”³

In this instance, the agency did make some changes to the proposed rules after it published a version of those rules in the *State Register*.⁴ Specifically, the agency seeks to authorize both the DataMaster DMT-G and DataMaster DMT with Rev A Fuel Option as instruments for analyzing breath samples – although the latter unit was not addressed in the *State Register* publication. The agency needed to address the addition of a new rule subpart in its Order adopting the rules.

This absence of detail required by Minn. R. 2410, subpart 2 (A) cannot be cured by reference to the rulemaking record or waived as a harmless error.

To cure the error, the agency must submit a revised adoption order that includes “a description of the changes” it made following publication of the proposed rules in the *State Register* and “an explanation of the reasons for the changes, and why they do not make the rule substantially different”⁵

¹ Minn. R. 1400.2100.

² Minn. R. 1400.2410, subp. 2 (I).

³ Minn. R. 1400.2090, Item A.

⁴ See, 36 *State Register* 763 (January 9, 2012).

⁵ Minn. R. 1400.2090, Item A.

Technical Suggestions

While agency officials undertake a review of the rulemaking record, and draft a revised Order adopting the rules,⁶ they may wish to consider a few revisions to the rule text so as to make the Department's regulatory intent plain.

The proposed rule is more awkwardly phrased than the rule that it replaces. The proposed revision of Part 7502.0425 states:

Subp. 2 The DataMaster DMT-G with Fuel Cell Option is approved by the commissioner for use for the purpose of determining the alcohol concentration of a breath sample employing infrared technology only, and for use employing infrared technology used in conjunction with fuel cell technology.

Subp. 3 The DataMaster DMT-G with Rev A Fuel Cell Option is approved by the commissioner for use for the purpose of determining the alcohol concentration of a breath sample employing infrared technology only, and for use employing infrared technology used in conjunction with fuel cell technology.

Presumably, the Department seeks to authorize the use of two different assessment technologies that are offered by the DataMaster units. If this is so, one possible rephrasing might be:

Subp. 2 The DataMaster DMT-G is approved by the commissioner for the purpose of determining the alcohol concentration of a breath sample, provided that the sample is analyzed using either the unit's infrared technology or the unit's infrared technology in conjunction with its fuel cell technology.

Subp. 3 The DataMaster DMT-G with Rev A Fuel Cell Option is approved by the commissioner for the purpose of determining the alcohol concentration of a breath sample, provided that the sample is analyzed using either the unit's infrared technology or the unit's infrared technology in conjunction with its fuel cell technology.

Additionally, the Department should consider whether the newly authorized units are correctly denominated as "DataMaster" or "Datamaster" as each spelling of the unit's brand name is used in the proposed rules.

With this said, the proposed rules as set forth in Revisor Draft AR 4060 are not so vague or ambiguous as to be defective. Thus, the revisions described above are mere suggestions that the agency may adopt if it so chooses. This kind of editorial

⁶ Minn. R. 1400.2410, subp. 6.

revision would be needed and reasonable and would not make the rules substantially different than originally proposed.

E. L. L.